

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7861 of 1997

For Approval and Signature:

Hon'ble THE CHIEF JUSTICE MR. K.SREEDHARAN
and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
1 & 2 : YES / 3 to 5 : NO

ASHOK C VORA

Versus

STATE OF GUJARAT

Appearance:

MR MC BHATT with MR JOY MATHEW for Petitioner
MS. AMI YAGNIK, AGP, for Respondent No. 1
MR KAMAL TRIVEDI for
M/S TRIVEDI & GUPTA for Respondent No. 2
MR SB VAKIL for Respondent No. 4
MR NV ANJARIA for Respondent No. 5
Respondent No.3 served

CORAM : THE CHIEF JUSTICE MR. K.SREEDHARAN and
MR.JUSTICE A.R.DAVE

Date of decision: 2/05/98

C.A.V. JUDGMENT (Per A.R. Dave, J.)

Rule. Service of rule is waived by A.G.P. Ms. Ami Yagnik, by learned Advocates Shri Kamal Trivedi, Shri S.B. Vakil and Shri N.V. Anjaria for respondents Nos. 1,2,4 and 5 respectively. With consent of the learned advocates the petition is finally heard today.

2. The petitioner, a pro bono publico, has approached this Court by way of a public interest litigation making a grievance with regard to huge expenditure incurred by Gujarat Industries Power Co. Ltd., which is a "State" within the meaning of Article 12 of the Constitution of India and respondent No.2 herein, in the matter of giving contracts to respondents Nos. 4 and 5 worth Rs. 320 Crores regarding excavation and removal of overburden, that is, doing earthwork of removal of mud, etc. so that lignite can be exposed and taken out and transported to a power plant. It has been alleged in the petition that in a clandestine manner, respondent No.2 entered into the contracts with respondents Nos. 4 and 5 at the behest of respondent No. 3, the then Chief Minister of the State of Gujarat.

3. Learned Advocate appearing for the petitioner has submitted that Respondent No. 2 ought to have given Public Advertisement before entering into contracts with respondents Nos. 4 & 5 so that respondent No. 2 Company could have saved sizable amount by getting more favourable offer from others. He has also submitted that substantial over payment could have been saved by inviting other persons for negotiation with respondent No. 2-Company before giving the said contracts. In support of the above referred submission, he has relied on the following judgments delivered by the Hon'ble Supreme Court :-

- (i) Haji T.M Hassan Rawther v. Kerala Financial Corporation, AIR 1988 SC 157;
- (ii) Shri Sachidahand Pandey & Anr. v. The State of West Bengal & Ors., AIR 1987 SC 1109;
- (iii) M.P Oil Extraction & Anr., v. State of M.P & Ors., (1997) 7 SCC 592;
- (iv) Fasih Chaudhary v. Director General, Doordharshan & Ors., AIR 1989 SC 157.

4. Learned Advocate appearing for respondent No.2 has pointed out the circumstances in which the Company had entered into the contracts with respondents nos. 4 &

5. He has submitted that removal of overburden/lignite excavation is a special type of job which is quite different from mere digging of earth. He has submitted that as there was urgency, the Company had approached Gujarat Mineral Development Corporation, which is a nodal agency in the State of Gujarat, Gujarat Power Corporation Ltd. and Neyveli Lignite Corporation, with a request to give names of agencies engaged in same type of work having sufficient experience as the said Companies were getting similar type of works done by some contractors and were maintaining a panel of contractors who had successfully done the work of similar nature in the past. Upon getting a list of 15 contractors, the Company had invited the concerned contractors to negotiate and ultimately a list of 9 contractors was prepared. The said contractors had submitted their tenders and after negotiating the rates, the concerned contractors, including others who had submitted their offers, the following position had emerged.

Parties Rates of overburden removal Rates for
(per cubic meter) as given removal for
different depths. of Lignite
(Per Cubic Mt)

		0-40 mt.	40-80 mt.	80+ mt.		
		Rs.	Ps.	Rs.	Ps.	Rs.
1.	Resp. No.4	42.67	47.52			59.40
						39.60
2.	Resp. No.5	43.28	48.50			59.75
						40.95
3.	B. Kumara- swamy Reddy	46.50	51.50			63.00
						42.00
4.	M/s. Ravi Udyog	45.50	53.00			69.00
						48.50

Rates at which the contract is ultimately given to
Respondents Nos. 4 & 5.

40.00	46.00	55.00	38.00
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5. It has also been submitted that it was not necessary to give any public advertisement as it would not have made any difference because of peculiar facts and circumstances of the case. He has relied upon the following judgements delivered by the Hon'ble Supreme

Court and this Court to substantiate his submissions :

(i) Mahendra B. Shah v. State of Gujarat and Anr.
1992 (2) G.L.H. 93,

(ii) G.D. Zalani and Anr. v. Union of India and
Ors., AIR 1995 SC 1178,

(iii) Tata Cellular v. Union of India reported in AIR
1996 SC 11

(iv) M.P. Oil Extraction and Anr. v. State of M.P.
and Ors., (1997) 7 SCC 592.

6. He has further submitted that the Company wanted to complete the work in a particular time frame and delay or carelessness on the part of contractors could have adversely affected the entire project. So as to see that the work is done as soon as possible, ultimately, 70% of the work was entrusted to Respondent no. 4 and 30% of the work was entrusted to respondent no. 5. Thus, it has been submitted by the learned advocate appearing for the Company that all possible fairness was ensured in the transactions which are subject matter of the petition. Respondent No. 2 - Company has denied the allegation that the contracts were given to Respondents nos. 4 & 5 at the behest of respondent no. 3.

7. It has been further submitted by the learned advocate that the petitioner is not a bonafide pro bono publico but he wants to take undue advantage of the process of court under the pretext of public interest litigation because validity of the contracts which are subject matter of this petition was challenged in Special Civil Application No. 6820 of 1997 which was filed by B. Kumaraswamy Reddy, a sole proprietor of M/s. B. Kumaraswamy Reddy and the said petition was dismissed by this Court (Coram : S.D Pandit, J.) on 25.11.1997. The said fact was known to the petitioner and yet the present petition was being prosecuted.

8. It has been submitted by the learned advocates appearing for the respondents Nos. 4 & 5 that the present petition was effectively moved by the present petitioner only after Special Civil Application No. 6820 of 1997 was dismissed and it has been further submitted by them that under the garb of Public Interest Litigation, at the behest of some one who was not successful in getting the contract, the present petition has been filed. Respondents Nos. 4 & 5 have also filed

Affidavits denying the allegations with regard to malafides and have stated the circumstances in which the contracts were given to them in a rightful and legal manner.

9. We have heard the Learned advocates at length and we have also noted an important aspect which has been brought to our notice by the respondents. Shri B. Kumaraswamy Reddy had filed Special Civil Application No. 6820/97 as he was aggrieved by the manner in which the contracts in question were given to respondents Nos. 4 and 5. The said petition was dismissed on 25.11.1997. Attention of this fact was drawn to the Learned advocate appearing for the petitioner in the instant case. A copy of judgment delivered in the said matter was also placed on record of this Court. The Learned advocate for the petitioner was aware of the reasons stated in the said judgment for dismissal of the said petition. In spite of the said fact, the petitioner's advocate has vehemently argued the matter so as to see that the contracts given in favour of respondents Nos. 4 and 5 are ultimately cancelled at the instance of this Court.

10. Prima facie we find that the petitioner is not a truly public spirited person. Had it been so, he would not have persuaded the present litigation after knowing the fact that a single Judge of this Court had found the contracts in order. Moreover, against the judgment delivered in Special Civil Application No. 6820/97, an L.P.A. has already been filed. The said appeal has been admitted and is pending for final hearing. No interim relief has been granted in the said appeal. The above-referred to facts denote that this Court had already examined validity of the contracts given by respondent No.2 in favour of respondents Nos. 4 and 5. Normally, intention of a public spirited person is to see that something which is illegal or unlawful or something which has been done in a clandestine manner against the public interest is brought to the notice of the court. Once the matter comes to the limelight or when the court looks into it and finds the thing in order, the work of such a public spirited person would come to an end. Had it been so in the instant case, the petitioner would not have insisted to prosecute the present litigation. Upon knowing the fact with regard to dismissal of the petition on the same subject and even an appeal having been filed against the said judgment, the petitioner would not have shown enthusiasm to prosecute the present petition but the facts are different in the instant case. We are tempted to quote para-62 of judgment delivered in the case of Shri Sachidanand Pandey v. The State of West

Bengal (AIR 1987 SC 1109). "I conclude this short judgment with a lurking doubt in my mind, and with a question 'Is there something more than what meets the eye in this case ?' We also prima facie find that there appears to be something more than what is being seen patently in this petition under the guise of public interest litigation.

11. Even if we look at the facts of the case, we are satisfied that respondent No.2 has not acted in a manner which would be against the interest of the company or against the public interest. It is not in dispute that the nature of work which was sought to be done is of a special type. Special skill and special instruments and equipments are required for the purpose of removal of overburden. The affidavit filed by respondent No.5 reveals that equipments, machineries etc. worth approx. Rs. 8 crores have been mobilized and installed at the site from which the overburden is to be removed. It also appears that the said respondent has placed an order for machineries worth approx. Rs. 15 crores so as to complete the work within the time-frame. Thus, it is clear that the work to be done is of a special type and it is not a simple case of digging of land.

12. In our opinion, when there is a specialized job requiring highly technical skill and special or expensive equipments are required for the purpose of carrying out a contract, it may not be obligatory on the part of the State or an instrumentality of the State to give a public notice or advertisement inviting offers from a large number of persons desirous of carrying out the job to be done or to give a contract to a person offering to do the job at the lowest rate.

13. Upon perusal of the judgments cited and referred to hereinabove, we can summarise the legal position with regard to the process of entering into a contract by the State or its instrumentality as under :-

13.1 Normally, whenever any contract is to be entered into by the State or any instrumentality of the State, an effort should be made by the State or the concerned instrumentality of the State to see that all persons interested in entering into a contract with the State are duly informed so that fairness can be ensured. The transactions which might be entered into by the State or by any instrumentality of the State should not be suggestive of any discrimination or there should not be any impression of bias, favouritism or nepotism. A welfare state has a duty to act fairly and its actions

should be legitimate. Its dealings should be above board. Public interest should be of paramount consideration in all such contracts and therefore executive should not be permitted to exercise its discretion in an absolutely discretionary manner. Certain principles with regard to inviting offers from general public should be observed so that the executive may not have any opportunity to do favour to a particular person. All transactions entered into by the State should be fair and should be without any aversion, malice or affection. Such factors would normally be absent when offers are invited from all concerned persons after giving due publicity to the intention of the State or its instrumentality with regard to entering into a contract for a particular purpose. However, it is not absolutely necessary that in each and every case where the State or its instrumentality has to give a contract for getting some work done, the contract must be entered into with a person who is offering the lowest rate. There can be several other important considerations. In exceptional cases, without issuance of public advertisement or without inviting tenders by giving public advertisement, the State or its instrumentality can enter into a contract. In exceptional cases, it is open to the Government to invite a limited number of persons and to get the work done on contract when the nature of work is such that specialised skill is to be used by the person performing the contract. The State can also consider past performance, general reputation, urgency of work, special skill of the contractor etc. while entering into a contract and in such a case the State may not accept offer of a person whose terms are apparently beneficial to the State. What is expected of the State and its instrumentality is fairness in its actions. When a welfare state has taken up so many activities in addition to its sovereign duties, it also become necessary to see that the State behaves like a prudent person in the matter of entering into contract with others. If there is an urgency, in good faith work can be entrusted to someone with whom the State had good experience in the past or someone who is most reliable. At times, after having accepted contracts certain contractors do not complete the work and in a case where the contract is of vital importance, such a behaviour of the contractor can surely put the government into difficulties and so as to obviate such possibilities of breach of the contract being committed, the State can enter into a contract with a reliable person. What is to be seen is whether the executive exercising discretion has acted fairly and in the public interest. In such a case the concerned authority should exercise its discretion in a manner in

which a shrewd businessman would act.

14. Thus, it would not be just and proper on the part of the court to sit in appeal in the matter of each and every contract entered into by the State or its instrumentality. What is to be seen by the court in a matter which has been filed by way of public interest litigation or by a person who is aggrieved for not getting an opportunity to enter into a contract with the government is whether the State or instrumentality of the State had acted fairly. If the court finds that the action of the State or its instrumentality was just, fair and without any bias, favouritism or nepotism, this Court should not interfere with the decision taken by the State or its instrumentality with regard to entering into a contract with a person whose terms were apparently not much beneficial to the State or its concerned instrumentality. Very often the things which are the cheapest are not advantageous in the long term. Very often individuals who are more concerned with their own funds spend more money by getting things manufactured by a concern of good reputation. They go to experts, expert lawyers, expert doctors, expert engineers, without bothering about the fact that they pay more to the concerned professionals. Such considerations should also weigh with the government authorities when they enter into a contract like an individual. If the court is prima facie satisfied that there is no bias, favouritism or nepotism, the court would not sit in appeal over the decision taken by the executive.

15. In the instant case, the nature of work to be done was of a special type. Funds procured or to be procured by respondent No. 2 - Company were to be utilised in a particular time. There was urgency as the entire project was to be concluded in a particular time. In the light of the said background, we have examined facts of this case and we are satisfied with the manner in which respondent No. 2 Company has worked. After inviting names of suitable contractors, they had invited offers from everyone. Those who were interested in getting the work had sent their offers to the company. On three different occasions, the respondent company had tried to negotiate with the concerned contractors. The company was successful in getting the rates revised in favour of respondent No.2 company at every meeting. The said fact reveals that respondent No.2 company had made all possible efforts to see that the work is done at a lesser cost.

16. So far respondent No. 4 is concerned, it had

done work of similar type by entering into a contract with respondent No.2 company in the past. The said work was satisfactory. This is also an important factor. When the work is of a special nature, normally a person would not like to take a chance by getting the work done by different person especially when he has got an experience of someone in the past. What we have to see is whether respondent No.2 company has acted in a manner which would befit a normal prudent person. We do not see that respondent No.2 company had digressed from the norms which in normal circumstances a man of ordinary prudence would follow. All possible efforts were made to see that the best available persons are invited to negotiate. The matter with regard to rates was discussed and negotiated on different occasions and ultimately the work was entrusted to a person who was prepared to offer the least rate. So as to see that the work was done within the time frame, the work was divided amongst two different contractors as it was not possible for one of them to complete the work. The above-referred facts show that respondent No.2 had acted in an absolutely just and proper manner.

17. With regard to the allegation about respondent No.2 company being influenced by the then Hon'ble Chief Minister of the State of Gujarat, we do not find any substance in the said allegation. It is alleged by the petitioner that no affidavit denying allegations has been filed by respondent No.3. We do not think it necessary for Respondent No. 3 to file such an affidavit in the instant case for the simple reason that the decision with regard to giving contracts was taken by respondent No.2 company. Respondent No.2 company has denied the allegations and has specifically stated that the contracts were awarded to respondents Nos. 4 and 5 purely on merits and after having found that the rates offered by them were the lowest. We have found the said statement to be correct. In such set of circumstances, mere absence of an affidavit denying allegations by respondent No.3 would not vitiate the proceedings. Denial should be from the person against whom allegations of mala fide have been levelled. Decision in the instant case was of respondent No.2 company and it has denied the allegations. Looking to the said circumstances, and looking to the facts of the case, we do not think it necessary to have a denial from respondent No. 3 with regard to allegations levelled against him.

18. Looking to the above-referred factual aspect, we do not think that this Court should interfere with the decision taken by respondent No.2 company with regard to

giving contracts of excavation of earth or removal of overburden and extracting lignite in favour of respondents Nos. 4 and 5. We strongly feel that the present petitioner ought not to have prosecuted this petitioner after knowing the fact that a learned single Judge of this Court had looked into all relevant facts with regard to the subject-matter of the present petition and had come to the conclusion that the decision taken by respondent No.2 company was just and proper and was also in the interest of respondent No.2 company. In our opinion, a man with ordinary prudence who was not guided by any extraneous factor, would not have proceeded with the present litigation after knowing outcome of Special Civil Application No. 6820/97.

19. As stated hereinabove, since we do not find any fault with the decision taken by respondent No.2 company, the petition is dismissed. Looking to the facts of the case, the petitioner is directed to pay Rs. 10,000/= by way of costs to Respondent no. 2 - Company. Rule is discharged.

(K. Sreedharan, C.J.)

(A.R. Dave, J.)

Prakash/hn*